

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

TIMOTHY I KOON
Claimant

HORMEL FOODS CORPORATION
Employer

APPEAL 16A-UI-11148-JCT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**OC: 09/11/16
Claimant: Respondent (2)**

Iowa Code § 96.5(2)a – Discharge for Misconduct
Iowa Code § 96.5(1) – Voluntary Quitting
Iowa Code § 96.3(7) – Recovery of Benefit Overpayment
Iowa Admin. Code r. 871-24.10 – Employer/Representative Participation Fact-finding Interview

STATEMENT OF THE CASE:

The employer filed an appeal from the October 3, 2016, (reference 01) unemployment insurance decision that allowed benefits. The parties were properly notified about the hearing. A telephone hearing was held on October 31, 2016. The claimant did not register a phone number with the Appeals Bureau and did not participate. The employer participated through Todd Richardson, hearing representative with Employer's Unity. Melissa Silvia, claim consultant for Employer's Unity, testified on the issue of employer fact-finding participation only. Employer witnesses included Erin Montgomery and Brad Kirtley. Employer exhibits one through four were received into evidence. The administrative law judge took official notice of the administrative records including the fact-finding documents. Based on the evidence, the arguments presented, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUES:

Was the claimant discharged for disqualifying job-related misconduct?
Has the claimant been overpaid any unemployment insurance benefits, and if so, can the repayment of those benefits to the agency be waived?
Can any charges to the employer's account be waived?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed full-time as a quality control auditor and was separated from employment on August 29, 2016, when he was discharged for falsifying company records, specifically falsifying a packaging metal detector record on August 17, 2016.

The employer operates a food preparation facility, and as such, implements various safeguards and checks to ensure that packaged food product is safe before leaving its facilities. At the time of hire, the claimant was issued a copy of employer work rules and acknowledged receipt of the

rules (Employer exhibit 1). As part of the work rules is a policy prohibiting falsification of company records (Employer exhibit 1). The claimant was trained in his position by Brad Kirtley, and as part of the training, he learned that each hour a metal detector test was to be performed to ensure the metal detectors that oversaw packaging of food were working properly and to ensure food integrity. Failure to complete the checks could result in a possible product recall and loss to the employer. The claimant was expected to use a small wand with metal to conduct the test at the top of each hour, then sign the log with his initials, right after completing the test. The claimant and Mr. Kirtley would take turns during the shift to complete the checks.

The final incident occurred on August 17, 2016, when the claimant signed off completing the metal detector check at 2:00 p.m. (employer exhibit 2). Mr. Kirtley had the only equipment to perform the check in his possession beginning around 1:40 p.m. and intended to complete the 2:00 p.m. check. While en route to the detector, Mr. Kirtley was stopped and became distracted for a period of twenty or so minutes. He then completed the check and went to the record log to record his initials. He saw the claimant had signed off already as performing the check at "14:00" and initialed the corresponding slot acknowledging he was the auditor who had completed the check (Employer exhibit 2). Mr. Kirtley confronted the claimant about the log and the claimant said he had conducted the check. Mr. Kirtley challenged the claimant, stating the claimant could not have, because Mr. Kirtley had the wand used to perform the checks in his possession and there was only one set of equipment for checks. The claimant called Mr. Kirtley a liar before walking off. Mr. Kirtley reported the claimant's conduct, which triggered an investigation.

In addition to interviewing both Mr. Kirtley and the claimant, who denied falsifying the log, the employer pulled surveillance footage above the detector machines. Through a review of footage, the employer determined the claimant had not performed the checks but recorded on the log that he had completed them, not only for 2:00 p.m. but also for 8:04 a.m., 9:00, 11:20, and 12:36 (Employer exhibit 2). The employer in its review, checked minutes before and after the time recorded, to ensure the checks had not been performed. He was subsequently discharged, even without prior warning, based on the seriousness of the offense.

The administrative record reflects that claimant has received unemployment benefits in the amount of \$1,900.00, since filing a claim. The administrative record also establishes that the employer did participate in the September 23, 2016 fact-finding interview by way of Melissa Silvia, UC consultant with Employer's Unity.

The claimant did not attend the hearing or request a postponement of hearing. The claimant also did not submit any written statement or evidence in lieu of participation.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Admin. Code r. 871-24.32(1)a provides:

871—24.32 Discharge for misconduct.

24.32(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as

is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id.* Assessing the credibility of the witnesses and reliability of the evidence in conjunction with the applicable burden of proof, as shown in the factual conclusions reached in the above-noted findings of fact, the administrative law judge concludes that the employer has satisfied its burden to establish by a preponderance of the evidence that the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law.

The credible evidence presented is that the claimant willfully falsified the metal detector check record on August 17, 2016, when he failed to perform his detector checks, but documented completion. At a minimum, the claimant falsified the 2:00 p.m. check, inasmuch as Mr. Kirtley had the equipment needed to perform the check in his possession, beginning at 1:40 p.m. until after 2:00 p.m., which meant the claimant physically could not have performed the check at the time recorded. Further, the employer reviewed surveillance footage and determined that in addition to 2:00 p.m., the claimant had not performed checks as recorded at 8:04 a.m., 9:00, 11:20, and 12:36 (Employer exhibit 2).

Some employee conduct is so egregious that a single incident might trigger disqualifying misconduct. Workers in the human food production and processing industry reasonably have a higher standard of care required in the performance of their job duties to ensure public safety and health, as was the case here. The very nature of the claimant's job was to check metal detectors which oversaw food packaging, to ensure integrity of food product. The employer reasonably relied upon the claimant to do his checks to ensure the metal detector machine was

working properly and able to catch any matter before it left the plant and entered the public for consumption. Based on the evidence presented, the administrative law judge concludes the claimant knew or should have known his failure to complete the checks and further falsify his check records could lead to his discharge, based on the importance of food safety and the employer's reasonable work rules that prohibit falsifying work documents (Employer exhibit 1).

Honesty is a reasonable, commonly accepted duty owed to the employer. The claimant did not attend the hearing to refute the credible testimony presented by the employer. The administrative law judge is persuaded the claimant knew or should have known his conduct was contrary to the best interests of the employer. Therefore, based on the evidence presented, the claimant was discharged for reasons that would constitute misconduct, even without prior warning for similar conduct. Benefits are denied.

Iowa Code § 96.3(7)a-b provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) (a) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding § 96.8, subsection 5. The employer shall not be relieved of charges if benefits are paid because the employer or an agent of the employer failed to respond timely or adequately to the department's request for information relating to the payment of benefits. This prohibition against relief of charges shall apply to both contributory and reimbursable employers.

(b) However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to § 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this states pursuant to § 602.10101.

Iowa Admin. Code r. 871-24.10 provides:

Employer and employer representative participation in fact-finding interviews.

(1) "Participate," as the term is used for employers in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means submitting detailed factual information of the quantity and quality that if unrebutted would be sufficient to result in a decision favorable to the employer. The most effective means to participate is to provide live testimony at the interview from a witness with firsthand knowledge of the events leading to the separation. If no live testimony is provided, the employer must provide the name and telephone number of an employee with firsthand information who may be contacted, if necessary, for rebuttal. A party may also participate by providing detailed written statements or documents that provide detailed factual information of the events leading to separation. At a minimum, the information provided by the employer or the employer's representative must identify the dates and particular circumstances of the incident or incidents, including, in the case of discharge, the act or omissions of the claimant or, in the event of a voluntary separation, the stated reason for the quit. The specific rule or policy must be submitted if the claimant was discharged for violating such rule or policy. In the case of discharge for attendance violations, the information must include the circumstances of all incidents the employer or the employer's representative contends meet the definition of unexcused absences as set forth in 871—subrule 24.32(7). On the other hand, written or oral statements or general conclusions without supporting detailed factual information and information submitted after the fact-finding decision has been issued are not considered participation within the meaning of the statute.

(2) "A continuous pattern of nonparticipation in the initial determination to award benefits," pursuant to Iowa Code section 96.6, subsection 2, as the term is used for an entity representing employers, means on 25 or more occasions in a calendar quarter beginning with the first calendar quarter of 2009, the entity files appeals after failing to participate. Appeals filed but withdrawn before the day of the contested case hearing will not be considered in determining if a continuous pattern of nonparticipation exists. The division administrator shall notify the employer's representative in writing after each such appeal.

(3) If the division administrator finds that an entity representing employers as defined in Iowa Code section 96.6, subsection 2, has engaged in a continuous pattern of nonparticipation, the division administrator shall suspend said representative for a period of up to six months on the first occasion, up to one year on the second occasion and up to ten years on the third or subsequent occasion. Suspension by the division administrator constitutes final agency action and may be appealed pursuant to Iowa Code section 17A.19.

(4) "Fraud or willful misrepresentation by the individual," as the term is used for claimants in the context of the initial determination to award benefits pursuant to Iowa Code section 96.6, subsection 2, means providing knowingly false statements or

knowingly false denials of material facts for the purpose of obtaining unemployment insurance benefits. Statements or denials may be either oral or written by the claimant. Inadvertent misstatements or mistakes made in good faith are not considered fraud or willful misrepresentation.

This rule is intended to implement Iowa Code section 96.3(7)“b” as amended by 2008 Iowa Acts, Senate File 2160.

Because the claimant's separation was disqualifying, benefits were paid to which he was not entitled. The claimant had been overpaid \$1,900.00 in unemployment insurance benefits. The unemployment insurance law provides that benefits must be recovered from a claimant who receives benefits and is later determined to be ineligible for benefits, even though the claimant acted in good faith and was not otherwise at fault. However, the overpayment will not be recovered when it is based on a reversal on appeal of an initial determination to award benefits on an issue regarding the claimant's employment separation if: (1) the benefits were not received due to any fraud or willful misrepresentation by the claimant and (2) the employer did not participate in the initial proceeding to award benefits. The employer will not be charged for benefits if it is determined that it did participate in the fact-finding interview. Iowa Code § 96.3(7), Iowa Admin. Code r. 871-24.10. In this case, the claimant has received benefits but was not eligible for those benefits. The employer satisfactorily participated in the fact-finding interview by way of its third party representative, Melissa Silvia. Since the employer did participate in the fact-finding interview the claimant is obligated to repay the benefits he received and the employer's account shall not be charged.

DECISION:

The October 3, 2016, (reference 01) decision is reversed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible. The claimant has been overpaid unemployment insurance benefits in the amount of \$1,900.00, and is obligated to repay the agency those benefits. The employer did participate in the fact-finding interview and its account shall not be charged.

Jennifer L. Beckman
Administrative Law Judge

Decision Dated and Mailed

jlb/pjs